

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

IN THE MATTER OF:

Lower Big Creek Tailings Pond,  
Shoshone County, Idaho

Sunshine Mining and Refining, Inc.  
and Sunshine Precious Metals, Inc.

CERCLA DOCKET NO.

**ADMINISTRATIVE ORDER  
ON CONSENT FOR ACCESS**

WHEREAS, Sunshine Precious Metals, Inc. ("**Metals**") is the wholly-owned subsidiary of Sunshine Mining and Refining, Inc. ("**Mining**"), and the Owner and Operator of the former Lower Big Creek Tailings Pond (the "Site") which is located in Shoshone County, Idaho, and is a part of the Bunker Hill Facility, a Superfund site listed on the National Priorities List in 1983;

WHEREAS, the United States and Coeur d'Alene Tribe are parties to a Consent Decree entered in January 2001 by the United States District Court for the District of Idaho, No. 96-0122-N-EJL and No. 91-0342-N-EJL, resolving claims by the United States and the Tribe against **Metals and Mining** for response costs incurred or to be incurred at the Bunker Hill Facility under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, and natural resource

1 damages at the Bunker Hill Facility under Section 107 of CERCLA, 42 U.S.C. § 9607, and  
2 Section 311 of the Clean Water Act, 33 U.S.C. §1321;

3 WHEREAS, in the aforementioned Consent Decree the United States and Tribe  
4 reserved their claims under CERCLA for areas within the real property owned or controlled  
5 by **Metals and Mining** within the Facility, including the Site relevant to this Administrative  
6 Order for Consent on Access;

7 WHEREAS, Metals has ceased operations at the Sunshine Mine pending a  
8 substantial increase in silver prices and has no employees on its properties other than those  
9 assigned to maintain its security;

10 WHEREAS, the United States Environmental Protection Agency ("EPA") and  
11 the Idaho Department of Environmental Quality ("IDEQ") have requested access from **Metals**  
12 **and Mining** to use the Site as a repository, and to deposit onto the Site soils and sediments  
13 from residential, commercial and common use areas in the Bunker Hill Facility that are  
14 contaminated with mining wastes containing hazardous substances such as cadmium, lead and  
15 zinc;

16 WHEREAS, the excavation and disposal of hazardous soils and sediments is  
17 being undertaken as a removal action pursuant to EPA's authority under the Comprehensive  
18 Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, et seq  
19 ("CERCLA");

20 WHEREAS, EPA will be responsible for all repository operations at this Site as  
21 discussed in the Order;

22 WHEREAS, this CERCLA action is being conducted by EPA in accordance with  
23 the National Oil and Hazardous Waste Pollution Contingency Plan ("NCP"), and the NCP  
24 establishes no independent requirements for **Metals and Mining** beyond the terms of this  
25 Order in accepting the contaminated soils and sediments excavated pursuant to this CERCLA  
26 action, and therefore, in accepting these soils and sediments for disposal, and complying with  
27 the terms of this Order, **Metals and Mining** are acting in accordance with the NCP;

1 WHEREAS, the CERCLA removal action being conducted by EPA responds to  
2 releases or potential releases of hazardous substances from mining activities in the Coeur  
3 d'Alene Basin, and EPA believes that releases or threatened releases of hazardous substances  
4 from those mining activities creates a danger to public health or welfare or the environment;  
5 and

6 WHEREAS, **Metals and Mining** are voluntarily participating in this response  
7 action and are concerned that their voluntary participation in this effort not subject them to  
8 liability under CERCLA or the Resource Conservation and Recovery Act ("RCRA") for  
9 releases or threatened releases of hazardous substances, pollutants, or contaminants for which  
10 they would not otherwise be liable but for their participation in this effort;

11 WHEREAS, **IDEQ intends to purchase the Site from Metals within eighteen**  
12 **months of the effective date of this Order, and such intention is contingent on**  
13 **subsequent conditions, including but not limited to: establishment of a purchase price**  
14 **(which shall be fair market value of the Site less the actual cost to EPA or IDEQ to**  
15 **design and construct a disposal cell within the Site to contain certain Metals materials);**  
16 **survey of the Site by IDEQ; performance of any due environmental diligence review of**  
17 **the Site deemed appropriate by IDEQ; final approval by IDEQ and EPA of a**  
18 **cooperative agreement providing for the long term operation and maintenance of the**  
19 **Site, match and credit and other appropriate CERCLA assurances and issues; and,**  
20 **appropriate IDEQ authority and funding;**

21 NOW THEREFORE, EPA, IDEQ and **Metals and Mining** are entering into this  
22 Administrative Order on Consent for Access ("Order").

23 **I. JURISDICTION AND GENERAL PROVISIONS**

24 1. This Order is issued pursuant to the authority vested in the President of the  
25 United States by Sections 104, 106(a) and 107 of CERCLA, as amended, 42 U.S.C. §§ 9604,  
26 9606, and 9607, and delegated to the Administrator of the EPA by Executive Order 12580,  
27 January 23, 1987, 52 Federal Register 2923, and further delegated to the EPA Regional

Administrators by EPA Delegations Nos. 14-14-A and 14-14-C and further delegated to the Unit Manager, Office of Environmental Cleanup, Region 10. **This Administrative Order on Consent for Access is also issued pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States. IDEQ's participation in this Administrative Order is pursuant to its authority under Idaho law, including but not limited to, Title 39, Chapters 1 and 44 of the Idaho Code.**

2. **Metals and Mining, and Reorganized Metals and Reorganized Mining,** hereby consent and agree to comply with and be bound by the terms of this Order. EPA, IDEQ and **Metals and Mining** agree that Metals' and Mining's consent to this Order, and their actions in accordance with this Order, shall not in any way constitute or be construed as an admission of any liability, which **Metals and Mining** expressly deny, or agreement to any legal or factual matters set forth in this Order, and, except in a proceeding to enforce this Order, are not admissible into evidence to establish any liability or legal or factual matter.

## II. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA in such regulations. Whenever terms listed below are used in this Order, the following definitions shall apply:

a. "Bunker Hill Facility" shall mean the areas where hazardous substances have come to be located in: (1) the South Fork of the Coeur d'Alene River and its tributaries, and their flood plains; (2) the main stem of the Coeur d'Alene River and its flood plain, including the lateral lakes and associated wetlands; and (3) Lake Coeur d'Alene;

b. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;

c. "IDEQ" shall mean the **State of Idaho Department of Health and Welfare, Department of Environmental Quality ("IDEQ")**;

d. "Reorganization Plan" shall mean the **Third Amended Joint Chapter 11**

1 **Plan of Reorganization in In Re: Sunshine Mining and Refining Company et al, Jointly**  
2 **Administered, CIV No. 00-3409 (MFW), in the United States Bankruptcy Court for the**  
3 **District of Delaware;**

4 e. **"Sunshine Antimony Plant" shall mean the Antimony Plant in the Coeur**  
5 **d'Alene Basin owned and operated by Metals;**

6 f. **"Metals" shall mean Sunshine Precious Metals, Inc., and includes the**  
7 **reorganized entity of that name existing after the effective date of the Reorganization**  
8 **Plan.**

9 g. **"Mining" shall mean Sunshine Mining & Refining Company, and**  
10 **includes the reorganized entity of that name ("Reorganized Mining") existing after the**  
11 **effective date of the Reorganization Plan;**

12 h. **"Site" is the area shown on Attachment A to this Order and is located in**  
13 **Shoshone County in northern Idaho, south of Interstate 90 along the road that accesses the**  
14 **Sunshine Mine;**

15 i. **"United States" shall mean the United States of America, its departments,**  
16 **agencies, and instruments.**

17 **III. FINDINGS OF FACT**

18 4. **The Bunker Hill Facility contains mining-related waste that is an actual or**  
19 **potential source of releases of hazardous substances to the environment.**

20 5. **With Metals' agreement, the repository ("Repository") will be constructed by**  
21 **EPA on land owned by Metals.**

22 6. **The disposal of soils and sediments on the Site and construction of the**  
23 **Repository will be consistent with and in accordance with the NCP.**

24 7. **Construction and use of the Repository is in the public interest because it will**  
25 **immediately address environmental conditions of concern in the Coeur d'Alene Basin and will**  
26 **address risks to human health posed by mining wastes.**

27 8. **Metals and Mining are concerned that their voluntary grant of access to EPA**

1 not subject them to liability under CERCLA or other authority for releases or threatened  
2 releases of hazardous substances, pollutants or contaminants for which they would not be  
3 liable but for their participation in this effort.

#### 4 IV. CONCLUSIONS OF LAW AND DETERMINATIONS

5 9. Based on the Findings of Fact set forth above, EPA has determined that:

6 a. The Site is part of the Bunker Hill Facility, which is a "facility" as defined  
7 by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

8 b. The contaminants located at the Bunker Hill Facility include "hazardous  
9 substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

10 c. The conditions described in the Findings of Fact above constitute an actual  
11 or threatened "release" of hazardous substances from the facility as defined by Section  
12 101(22) of CERCLA, 42 U.S.C. § 9601(22).

13 d. The actual or threatened release of hazardous substances from the Site and  
14 Bunker Hill Facility may present an imminent and substantial endangerment to the public  
15 health, welfare, or the environment within the meaning of Section 106(a) of CERCLA, 42  
16 U.S.C. § 9606(a).

17 e. The actions required by this Order are necessary to protect the public  
18 health, welfare, or the environment in accordance with Section 106(a) of CERCLA, and are  
19 consistent and in accordance with the NCP and CERCLA.

#### 20 V. ORDER

21 10. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations,  
22 and the Administrative Record for the Facility, it is hereby ordered and agreed as follows:

23 a. **Metals or Mining** shall, at least thirty (30) days prior to the conveyance of  
24 any interest in real property at the Site, give written notice to the transferee that the property is  
25 subject to this Order, along with written notice to EPA and IDEQ of the proposed  
26 conveyance, including the name and address of the transferee. **Metals** agrees to require its  
27 successor to comply with the immediately preceding sentence and the requirements set forth

1 in Paragraph b. below.

2 b. For eighteen months after the Effective Date of this Agreement, **Metals**  
3 **and Mining** shall grant EPA and **IDEQ** access to Sunshine-owned or controlled property  
4 within the Site for purposes of EPA's construction and use of the Site as a repository.

5 c. EPA agrees to make the Site available to third parties for disposal of  
6 contaminated soils and sediments, and EPA will oversee such disposal, except that EPA may  
7 refuse the disposal of any material that EPA deems unsuitable for disposal at the Site. EPA  
8 shall refer to **Metals** any third party seeking the disposal of more than three cubic yards of  
9 contaminated soils or sediments at the Site, for **Metals** to negotiate the payment of a tipping  
10 fee to **Metals and/or Mining**.

11 VI. EPA ON-SCENE COORDINATOR/REMEDIAL PROJECT MANAGER

12 11. EPA has appointed Nicholas Ceto as the On-Scene Coordinator/Remedial  
13 Project Manager ("OSC/RPM") for this response action. The OSC/RPM shall be responsible  
14 for overseeing the proper and complete implementation of this Order consistent with the NCP.

15 12. EPA **and IDEQ** shall comply with any and all applicable laws and regulation  
16 with respect to the Site, **including any and all applicable monitoring and reporting**  
17 **requirements**.

18 VII. DUE CARE/COOPERATION

19 13. **Metals and Mining** shall exercise due care at the Site with respect to any mining  
20 materials already existing on the Site and shall comply with all applicable local, State, and  
21 federal laws and regulations. **Metals** recognizes that the implementation of response actions  
22 at the Site may interfere with its use of the Site, and may require closure of its operations or a  
23 part thereof. **Metals** agrees to cooperate fully with EPA **and IDEQ** in the implementation of  
24 response actions at the Site and further agrees not to interfere with such response actions.  
25 EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts  
26 to minimize any interference with **Metals'** operations by such entry and response. In the event  
27 **Metals or Mining** become aware of any action or occurrence which causes or threatens a

1 release of hazardous substances, pollutants or contaminants at or from the Site that constitutes  
2 an emergency situation or may present an **imminent** threat to public health or welfare or the  
3 environment, **Metals or Mining** shall in addition to complying with any applicable  
4 notification requirements under Section 103 of CERCLA, 42 U.S.C. §9603, or any other law,  
5 immediately notify EPA **and IDEQ** of such release or threatened release.

## 6 VII. COVENANT AND RELATED PROVISIONS

7 14. In return for **Metals' and Mining's** compliance with the terms of this  
8 Agreement, and except to enforce the terms of this Agreement, EPA shall not institute or  
9 authorize any proceedings against, and the United States covenants not to sue, **Metals or**  
10 **Mining** under Sections 106 or 107 of CERCLA, 42 U.S.C. Sections 9606 and 9607, and/or  
11 Section 7003 of RCRA, 42 U.S.C. Section 6973, based on: (a) releases of hazardous  
12 substances disposed at the Site by EPA or an authorized representative in connection with  
13 EPA-authorized environmental response actions related to the Facility; or (b) releases of  
14 hazardous substances contained in wastes disposed at the Site by parties other than Sunshine,  
15 so long as such waste disposals are authorized by EPA. **In return for Metal's and Mining's**  
16 **compliance with the terms of this Agreement, and except to enforce the terms of this**  
17 **Agreement, IDEQ shall not institute or authorize any proceedings against and covenants**  
18 **not to sue, Metals or Mining under Sections 107 of CERCLA, 42 U.S.C. Section 9607,**  
19 **and/or the Idaho Hazardous Waste Management Act, Idaho Code Sections 39-4401 et**  
20 **seq., and or the Environmental Protection and Health Act, Idaho Code Sections 39-101**  
21 **et seq., based on: (a) releases of hazardous substances disposed at the Site by EPA or an**  
22 **authorized representative in connection with EPA-authorized environmental response**  
23 **actions related to the Facility; or (b) releases of hazardous substances contained in**  
24 **wastes disposed at the Site by parties other than Metals or Mining, so long as such waste**  
25 **disposals are authorized by EPA. The covenants in this Paragraph shall not apply to waste**  
26 **generated at or removed from the Sunshine Antimony Plant.**

27 15. The covenants and related provisions in this Section are conditioned upon  
28 **Metals and Mining** allowing access to EPA and IDEQ in full compliance with the terms of  
this Order. The covenants and related provisions extend only to **Metals and Mining** and do



1 not extend to any other person. Further, the covenants and related provisions shall not  
2 preclude liability for costs or damages as the result of negligence on the part of **Metals or**  
3 **Mining**.

#### 4 VIII. RESERVATION OF RIGHTS

5 16. Except as provided in this Order, nothing herein shall limit the power and  
6 authority of EPA or the United States or **IDEQ** to take, direct, or order all actions necessary to  
7 protect public health, welfare, or the environment or to prevent, abate, or minimize an actual  
8 or threatened release of hazardous substances, pollutants, or contaminants, or hazardous or  
9 solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA or **IDEQ** from  
10 seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or  
11 equitable action as it deems appropriate and necessary and as permitted by this Order, or from  
12 requiring **Metals and/or Mining** in the future to perform additional activities pursuant to  
CERCLA or any other applicable law as permitted by this Order.

#### 13 IX. OTHER CLAIMS

14 17. By issuance of this Order, the United States and EPA and **IDEQ** assume no  
15 liability for injuries or damages to persons or property resulting from any acts or omissions of  
16 **Metals or Mining**.

17 18. This Order does not constitute a preauthorization of funds under Section  
18 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2). **Metals and Mining** waive any claim to  
19 payment under Sections 106(b), 111, and 112 of CERCLA, 42 U.S.C. §§ 9606(b), 9611, and  
20 9612, against the United States or the Hazardous Substance Superfund arising out of any  
action performed under this Order.

21 19. No action or decision by EPA pursuant to this Order shall give rise to any right  
22 to judicial review except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

#### 23 X. METALS AND MINING'S RESERVATION OF RIGHTS

24 20. Nothing in this Order, except as specifically provided in Paragraph 18 of this  
25 Order, shall be construed as restricting **Metals' or Mining's** right to lawfully challenge or  
26 object to any future response actions that may be proposed at or affecting the Site, or as  
27 waiving, limiting, or affecting other rights, claims, causes of action, or demands **Metals or**  
**Mining** may have against any person under CERCLA, including with respect to natural

1 resource damages, or other federal, state, or common law.

2 XI. CONTRIBUTION PROTECTION

3 21. **Metals and Mining** shall be entitled to protection from contribution actions  
4 or claims as provided in Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for  
5 matters addressed in this Order. Matters addressed in this Order for purposes of  
6 contribution protection shall include all claims or causes of action under Sections 106  
7 and 107 of CERCLA, 42 U.S.C. §§ 9606 & 9607, and Section 7003 of RCRA, 42 U.S.C. §  
8 6973, for injunctive relief and response costs with respect to the Site. Nothing in this  
9 Order precludes the United States, IDEQ or **Metals or Mining** from asserting any claims,  
10 causes of action or demands against any persons not parties to this Order for indemnification,  
11 contribution, or cost recovery.

12 XII. INDEMNIFICATION

13 22. **Metals and Mining** agree to indemnify, save, and hold harmless the United  
14 States and IDEQ, their officials, agents, contractors, subcontractors, employees, and  
15 representatives from any and all claims or causes of action arising from, or on account of, acts  
16 or omissions of **Metals, Mining**, their officers, heirs, directors, employees, agents,  
17 contractors, subcontractors, receivers, trustees, successors, or assigns, in complying with, and  
18 fulfilling their obligations under, this Order. In addition, **Metals and Mining** agree to pay the  
19 United States and IDEQ all costs incurred by the United States or IDEQ, including litigation  
20 costs arising from or on account of claims made against the United States or IDEQ based on  
21 any of the acts or omissions referred to in this paragraph.

22 XIII. MODIFICATION

23 23. Any requirements of this Order may be modified, in writing, by mutual  
24 agreement of the Parties hereto.

25 XIV. SEVERABILITY

26 24. If a court issues an order that invalidates any provision of this Order or finds that  
27 **Metals and/or Mining** have sufficient cause not to comply with one or more provisions of  
28 this Order, **Metals and/or Mining** shall remain bound to comply with all provisions of this  
Order not invalidated or determined to be subject to a sufficient cause defense by the court's  
order.

1 XV. EFFECTIVE DATE

2 25. This Order may be executed in any number of counterparts, each of which when  
3 executed and delivered to EPA shall be deemed to be an original, but such counterparts shall  
4 together constitute one and the same document. This Order shall be effective upon signature  
5 by EPA, the U.S. Department of Justice and the State of Idaho.  
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1 The undersigned representative of Sunshine Precious Metals, Inc. and Sunshine Mining and  
2 Refining, Inc. certifies that he/she is fully authorized to enter into the terms and conditions of  
3 this Order at the Site and to bind Metals and Mining to this document.

4  
5 Name \_\_\_\_\_

\_\_\_\_\_ Date \_\_\_\_\_

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**So Agreed to:**  
**State of Idaho, Department of Environmental Quality**

<b>Steve Allred, Director</b>	_____	<b>Date</b>	_____
<b>Department of Environmental Quality</b>			
<b>State of Idaho</b>			

**Approved as to Form.**

<b>Curt Fransen, Deputy Attorney General</b>	_____	<b>Date</b>	_____
<b>Office of the Attorney General</b>			
<b>State of Idaho</b>			

1 This Order at the former Sunshine Lower Big Creek Tailings Pond is so ORDERED and  
2 Agreed.

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John Iani  
Regional Administrator  
Region 10  
U.S. Environmental Protection Agency

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Date

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John Cruden  
Acting Assistant Attorney General  
Environment and Natural Resources  
Division  
U.S. Department of Justice

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